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CORRESPONDENCE.

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EDITOR CALIFORNIA LAW REVIEW,

SIR:

In answer to Dean Henry W. Ballantine's Military Dictatorship (1 California Law Review, 413) I beg to say:

During a national war with any first class power, the federal Constitution does not inure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign. All spies should be forthwith tried by court-martial and, if convicted, shot.[1] Enemy sympathizers, after conviction by court-

[1] U. S. Rev. Stats., § 1343.

martial, should be either confined at hard labor during the war, or else should be deported to the enemy country as was Vallandigham.

In 1863, Vallandigham, the state leader of a great party in Ohio, publicly sympathized with the confederacy. Ohio was not at that time invaded. The courts were open. Vallandigham was tried by court-martial, was convicted of sedition and of sympathizing with the confederacy, and was sentenced to confinement in a fortress during the war. The Supreme Court refused to interfere.[2] By way of commutation of sentence he was then deported to the confederacy.

In 1904, Peabody, then Governor of Colorado, declared a county to be in a state of insurrection and ordered one Moyer to be arrested as a leader of the outbreak and detained by the national guard until he could be safely discharged, and then to be delivered to the civil authorities. This was done purely as a military arrest, without any civil process. It does not appear that the civil courts in the county were closed during the insurrection. After the termination of the insurrection, Moyer sued the former Governor, the former adjutant general of the national guard, and the captain of the company which arrested and confined him, for an alleged wrongful imprisonment. The Supreme Court unanimously upheld the acts of the Governor and the militia.[3]

In 1901, during the Boer war, a South African was arrested by order of the military authorities, removed 300 miles from his home and confined in a civil jail, by order of the military, in a district in which martial law prevailed although the civil courts remained open. The Privy Council upheld the arrest and confinement.[4]

In 1902, during the Boer war, convictions of imprisonment at hard labor and fines under martial law by an administrator of martial law for acts contravening martial law regulations against sedition and unlawful travel and removal were upheld, though made by the same person who was also the civil magistrate and whose civil court was open at the time.[5]

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[2] Ex parte Vallandigham (1863), I Wall. 243, 17 L. Ed. 589.
[3] Moyer v. Peabody (1909), 212 U. S. 78, 53 L. Ed. 410, 29 Sup. Ct. Rep. 235.
[4] Ex parte Marais, L. R. (1902), A. C. 109.
[5] Atty. Genl. v. Van Reenen, L. R. (1904), A. C. 114.

In 1914, a New Zealand reserve officer, not in actual service, went to Samoa after its capture and after all German resistance had ceased, and violated war regulations by exporting gold coin from Samoa, carrying personal letters from German prisoners there to their friends interned in New Zealand, and carrying photographs of a captured German wireless station as well as manuscript for the editors of two New Zealand papers. He was taken back to Samoa, tried there before a military court, convicted and sentenced to five years imprisonment in New Zealand. The New Zealand Supreme Court upheld the conviction and sentence.[6]

In 1915, a South African was arrested for violating a martial law regulation forbidding seditious language and was held for trial before a special military court. The Boer rebellion in South Africa did not break out until after the alleged sedition was committed and the civil courts remained open. The Supreme Court of South Africa refused to inquire into the matter or to restrain the military court from trying all those charged with violating the martial law regulations, notwithstanding the fact that the civil courts remained open.[7]

In 1914, an Australian statute authorizing the detention and confinement in military custody, during the war, of any naturalized person whom the Minister of Defense believed to be disaffected or disloyal, without the production of any evidence whatever, was upheld on the principle of the necessity of a dictatorship during a national war.[8]

In 1818, after the Mahratta Government at Poona had been overthrown, the Peishwa (or native absolute sovereign) surrenddered and his country was conquered. Lord Elphinstone, the commissioner commanding the occupied territory, seized the treasure and account books in the custody of the late treasurer of the native government. Hostilities had ceased and the civil and criminal courts of the East India Company were open. The treasurer's executors recovered judgment for what the Municipal Court of Bombay held was the private property or private treasure of the native ruler, as well as the treasurer's own prop-

[6] In re Gaudin, 34 N. Z. Rep. 401.

[7] Krohn v. Minister for Defence, South African L. R. (1915), App. Div. 191, 197-212.

[8] Lloyd v. Wallach (1914), 20 Commonwealth L. R. 299.

erty, which had been mingled with the private treasure. The Privy Council held that no civil court had jurisdiction, that recourse could only be had to the Government of India for redress.[9]

The Milligan case referred to by Dean Ballantine,[10] is not in point. The only question actually there decided was the legal but not constitutional question that the statute relied upon as a basis for the military courts did not in fact give authority to establish them in the places where they were set up.

Stieber, the chief of the Prussian spies in the wars of 1866 and 1870, says in his memoirs that, in the presence of von Bismarck, he told an officer of the Prussian General staff that his invisible army of 30,000 Prussian spies was as much a Prussian army as the visible and much larger fighting army of von Moltke, and that von Bismarck tacitly admitted it.[11]

The militaristic feudalism which has wantonly attacked us in the course of its struggle for world power or downfall, justifies its attempt to conquer the world by asserting that all free governments are disintegrating; that all free peoples are either corrupt, decadent or degenerate; that treaties, international law and constitutions are all alike nothing but scraps of paper; that feudalism with its war lords, Krupps, spies and cannon fodder is so superior to all free governments and all free people that it is above all laws, divine, international or human; also it asserts that no free government or free people have any rights which feudalism is bound to respect.

Any who assert that the Federal Constitution inures to the benefit of spies, secret agents of or sympathizers with the public enemy, must claim that the framers intended the Constitution to aid feudalism to conquer freedom. Any who assert that the spies of and sympathizers with a public enemy who desires to conquer and plunder us, as Cortez did to Mexico and Pizarro did to Peru, are entitled to the protection of the Constitution, must believe that the Constitution intended to limit and restrict the war power so as to deprive the nation of all means of defence.

Henry A. Forster.

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[9] Elphinstone v. Bedrechund (1818), 1 Knapp 316.
[10] In re Milligan (1866), 4 Wall. 2, 18 L. Ed. 281.
[11] Lanoir, German Spy System in France, 70-72.